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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Farmers & Merchants Bank and Trust Co.

Serial No.75733693

Frank B. Janoski and Chad W. Brigham for Farmers &
Merchants Bank and Trust Co.

Henry S. Zak, Trademark Examining Attorney, Law Office 108
(Andrew Lawrence, Managing Attorney).

Before Seeherman, Hairston and Zervas, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Farmers & Merchants Bank and Trust Co. has appealed
from the final refusal of the Trademark Examining Attorney
to register the mark shown below, with the words BANK &
TRUST disclaimed, for "banking, trust investment,
investment brokerage, and mortgage lending services."¹

¹ Application Serial No. 75733693, filed June 22, 1999,
asserting first use and first use in interstate commerce on
May 2, 1999.



Registration has been refused pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the mark shown below, with the word BANK disclaimed, previously registered for banking services, that, if used in connection with applicant's services, it is likely to cause confusion or mistake or to deceive.



Applicant and the Examining Attorney have filed briefs. Applicant did not request an oral hearing.

Before we turn to the substantive issue in this appeal, we must address a procedural objection by the Examining Attorney. With its appeal brief applicant has attached approximately 90 pages of exhibits, and has also listed in its brief what are asserted to be third-party applications and registrations for various marks. The Examining Attorney has objected to the exhibits and listings, and to that part of applicant's arguments relating to these exhibits and listings. The Examining Attorney's objections are well taken. Trademark Rule 2.142(d) provides that the record in an application should be complete prior to the filing of an appeal. The exhibits submitted by applicant with its brief are manifestly untimely. Moreover, not only is applicant's listing of third-party registrations and applications untimely, but a mere listing of information about an application or registration is not the proper way to make it of record. See *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974). Accordingly, we have not considered the exhibits, the listing or applicant's arguments based on such materials.

This brings us to the substantive issue in this appeal: likelihood of confusion. Our determination of

this is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

Applicant's identified "banking services" are legally identical to the "banking services" identified in the cited registration, while its trust investment, investment brokerage, and mortgage lending services are closely related. Applicant does not dispute this. This du Pont factor, thus, favors a finding of likelihood of confusion. Because the banking services are legally identical, the channels of trade for them are also legally identical. Applicant has argued that the channels of trade are different because "the Cited Mark is presumably marketed and sold to persons residing in a region in the United States (Granite Quarry, North Carolina) that is

geographically remote from the region where Applicant is located (Hannibal, Missouri, O'Fallon, Missouri and Quincy, Illinois)." Brief, p. 12. Essentially, applicant is asserting that the channels of trade are different because applicant's and registrant's services are rendered in geographically separate areas. Although this argument might have some validity if applicant were seeking a concurrent use registration, applicant is attempting to obtain a geographically unrestricted registration. With such a registration, applicant would be free to use its mark anywhere in the United States, including in any of the areas in which the registrant uses its mark. Further, the cited registration is unrestricted, so the registrant's protection extends throughout the United States. The du Pont factor of the similarity of trade channels favors a finding of likelihood of confusion.

Because the services are legally identical, they would be offered to the same classes of consumers, which would include the public at large. Applicant argues that the consumers of banking and financial services are careful. Although the decision to patronize a particular bank is not an impulse purchase, we do not think that the ordinary purchaser of such services exercises more than ordinary care. Because of the federal insurance that guarantees

bank deposits, the typical consumer does not have to consider, when choosing a bank, whether there is a possibility that the bank will fail. Consumers are much more likely to make their banking choices based on factors such as location, banking hours, etc., rather than the service mark of the bank. However, whether the purchasers exercise great care or ordinary care, we acknowledge that they may well notice the difference in stylization of the marks involved herein. The question is not whether they will recognize the differences in appearance between the marks, but whether they are likely to view these differences as indicating different sources of the services.

Before turning to the factor of the similarity of the marks, we point out that there is no evidence that the registrant's mark is a weak mark or that the registration should be accorded less than the normal degree of protection. On the contrary, there is no evidence of any third-party use of F & M marks.² During the course of examination the Examining Attorney had advised applicant of two prior pending applications for marks containing the letters "F" and "M," so these applications are of record.

² As discussed previously, the exhibits attached to applicant's appeal brief were not properly made of record.

However, third-party applications and/or registrations are not evidence that the marks are in use. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). Nor are two third-party applications/registrations sufficient to show that the letters F & M have a particular significance in the banking industry. The du Pont factor of the number of similar marks in use for similar services favors a finding of likelihood of confusion.

Turning now to a consideration of the similarity of the marks, we begin our analysis with the frequently cited principle that when marks would appear on virtually identical goods or services, as they do here, the degree of similarity necessary to support a conclusion of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Here, both marks consist of the identical letters "F" and "M," joined by an ampersand, along with, in the case of the cited mark, the generic term BANK, and in the case of applicant's mark, the generic terms BANK & TRUST. Both marks follow the same format; it is the letters "F" and "M" with an ampersand between them, and the generic term for the services depicted in smaller letters below the stylized "F & M" element. Obviously the stylized F & M is the dominant element in each mark; the

generic words BANK or BANK & TRUST have no source-indicating value. It is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

With respect to the dominant F & M element of each mark, the stylization of the letters is clearly different. However, the letters F & M are readily apparent in both marks. Applicant does not argue otherwise, and has, in its original application papers, identified its mark as "F & M BANK & TRUST in Stylized Letters." The inclusion of the ampersand between the stylized "F" and "M" and the words BANK & TRUST also indicate that the "F & M" are letters. Consumers are unlikely to view the letters as merely a design in these circumstances. Moreover, the specimens submitted by applicant show that applicant uses its trade name, Farmers & Merchants Bank and Trust Co., along with the logo. We may look to applicant's specimens to determine the commercial impression conveyed by the mark. Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.,

748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984). This trade name reinforces the impression that the lettering is "F & M."

We recognize that determining likelihood of confusion when letter marks are involved presents some special issues, in that stylized letter marks partake of both visual and oral indicia. See *In re Electrolyte Laboratories Inc.*, 929 F.2d 645, 16 USPQ2d 1239 (Fed. Cir. 1990). Both must be weighed in the context in which they occur. Id.

In this case, where the letters F & M are clearly apparent, consumers are very likely to articulate the letters, rather than perceiving them as a pure visual design. The additional words in both marks also suggest that the marks are meant to be spoken. Further, both applicant's mark and the cited mark are used for services. Because the services are intangible, there is a greater likelihood that consumers will refer to the source of the services orally, as opposed to picking up a product off a shelf, where they might rely on visual appearance alone. It is therefore appropriate to consider the similarity of the sound of the marks.

Thus, the marks, when compared in their entireties, are identical in connotation and identical in pronunciation

(since the additional generic term TRUST in applicant's mark does not serve a source-identifying function). While the different stylizations of the letters F & M create some differences in the appearances of the marks, the differences do not outweigh the other similarities. Overall, the marks convey the same commercial impression. Consumers who are familiar with the cited mark for banking services are likely, upon seeing applicant's mark, to view applicant's mark as a variation of the cited mark, with a more modern style of lettering, than consider it as identifying banking services from a separate source.

Applicant points to *In re Electrolyte Laboratories, Inc.*, supra, in support of its position that the marks are not similar. However, in that case, the Court criticized the Board's reliance on the fact that both marks would be pronounced the same way, noting that a design is viewed, not spoken. In the present situation not only have we provided reasons why the stylized letters are likely to be pronounced, but our finding that the marks are similar does not rest on the pronunciation alone. We also note that in Electrolyte the element common to both marks was the chemical symbol for potassium, and the goods were potassium supplements. Thus, the common element was descriptive, if not generic, for the goods. While the Court made clear

that all elements of a mark must be considered, some elements are entitled to less weight than others. In Electrolyte, the Court found that the Board gave too much weight to this descriptive/generic common element, and not enough to the design. In the present case, on the other hand, the common element "F & M" is arbitrary, and the overall format of the marks is the same. As we said above, while the different stylization of the letters creates some differences between the marks, it is not enough, given the other du Pont factors, to obviate the likelihood of confusion.

The only other du Pont factor that has been discussed is actual confusion or, more specifically, the lack of any evidence of actual confusion. With respect to actual confusion, applicant asserts that there has been contemporaneous use of the marks since applicant began using its mark in May 1999. However, as applicant has stated, use of its mark has been in a limited geographic area. If the registrant's actual area of use is also geographically limited, this could be the reason why applicant has not encountered any instances of confusion.³ We cannot infer from the lack of evidence of actual

³ We also point out that we have no information about whether the registrant has experienced any instances of confusion.

confusion that confusion is not likely to occur.

Accordingly, the du Pont factors of evidence of actual confusion and lack of evidence of such confusion are neutral.

Finally, applicant has asserted that it had and has no logical intent or motive to pass off its services as those of the registrant. We do not impute impure motives to applicant in its decision to adopt its mark. However, the statute prohibits the registration of marks if they are likely to cause confusion with a registered mark; that the applicant did not intend such confusion does not avoid this prohibition.

Having considered the du Pont factors on which there is evidence in the record, we find that applicant's mark for its identified services is likely to cause confusion with the cited registration. Moreover, to the extent that there is any doubt on this issue, such doubt must be resolved in favor of the registrant and prior user. In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Decision: The refusal of registration is affirmed.